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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RANDY ROGERS, Defendant and Appellant.	B232633 (Los Angeles County Super. Ct. No. YA074167)

APPEAL from a judgment of the Superior Court of Los Angeles County. James R. Brandlin, Judge. Affirmed.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Randy Rogers was charged with 17 counts of robbery (Pen. Code, § 211)[1] and after jury trial was found guilty of 12 of those counts. The jury was unable to reach a verdict on the other robbery charges and on one count of misdemeanor sexual battery (§ 243.4, subd. (e)(1)). As to those counts, a mistrial was declared, and they were later dismissed.

In a bifurcated proceeding, the court found true allegations that appellant had suffered four prior strike convictions (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i)), served two prior prison terms (§ 667.5, subd. (b)) and suffered two prior serious felony convictions (§ 667, subd. (a)(1)). Appellant was sentenced to a total of 160 years to life in state prison.

On this appeal, he contends that the trial court erred when it failed to hold an evidentiary hearing on possible jury misconduct and abused its discretion when it denied his motion under section 1385. We affirm.

Discussion[2]

1. Denial of a hearing on jury misconduct

Facts

After the verdict, appellant filed a motion for release of juror identification information. The motion attached two declarations, one from appellant's mother, Barbara Davenport, and one from appellant's friend Teresa Michel.

Davenport declared that she attended her son's trial, that on the day of the verdict, she and Michel were approached by two jurors, an Asian male (later determined to be Juror No. 2) and a White female, and one alternate juror, also a White female. They said

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[1] All further statutory references are to the Penal Code.

[2] The issues on appeal do not require a summary of the evidence at trial (which is, in any event, adequately set out in the briefs), with the exception of a few facts, which are relevant to our discussion of appellant's sentencing contention. Those facts are set out in that section of our opinion.

that they "were pressured to go along with the majority vote of guilty even though they did not believe any of the witnesses or either side of the case," that they "had difficulty with what was said by some of the jurors," and that "they felt that there appeared to be coaching by those witnesses."

Michel's declaration was similar. She said that Juror No. 2 "indicated" that he did not want to find appellant guilty but "went along with the majority because he felt it was necessary to do so." He also gave "some indication" that the jurors felt that "they all had to get out of there and get going." The female juror said that she felt pressure in regard to her verdict.

In response to appellant's motion, the court sent all the jurors letters (in a form approved by both counsel) asking whether they would consent to be contacted by counsel. Two agreed, an alternate and Juror No. 2. The rest either did not wish to be contacted, or in one instance, (Juror No. 1) did not respond.

The district attorney had an investigator contact Juror No. 2. Appellant did not contact that juror. The investigator's report was shared with the court and defense counsel.

The investigator reported that Juror No. 2 said that the jury's conclusion was fair, and that every juror's opinion was given equal value. One juror seemed confused at times, "so that the other jurors needed to take extra time to explain the counts and the evidence to her." However, Juror No. 2 believed that that juror was able to form her own opinion. The amount of time deliberations took "did not ultimately affect the outcome of the verdict."

Concerning the conversation with Davenport and Michel, Juror No. 2 said that he and a few other jurors, including the juror he had described as confused, saw appellant's family in the parking lot. He spoke to the woman he believed was appellant's mother. She said that she believed that her son was innocent, and the juror replied that the jurors had considered the evidence very carefully. Juror No. 2 saw other jurors speak to the woman and thought that they made comments similar to his.

Based on this information, appellant brought a motion for new trial on the ground of jury misconduct. The court denied the motion, noting that, given the defense objection to the district attorney investigator's report (which was not in the form of a declaration) it would not consider that report in its ruling. The court found that "I would note for the record that the jurors themselves, even if they were subpoenaed and brought into court, could not be examined with regard to their thought process" during deliberations. The court then found that there was no evidence of the kind of misconduct which is the proper subject of inquiry, and that "I certainly could understand why jurors . . . upon seeing family members who appear to be distraught over an adverse verdict, would feel a natural empathy for the defendant or the defendant's family members, and try to console them, if possible. [¶] But I certainly don't find that the declarations of Ms. Michelle [sic] and Ms. Davenport are sufficient for the purposes of establishing grounds for a new trial."

We note, too, that the jury was polled on the verdicts and on the issue of whether the jury was truly deadlocked, as to the mistried counts.

Discussion

Appellant's argument is that the court abused its discretion by failing to order an evidentiary hearing -- for which jurors could be subpoenaed -- on the issue of jury misconduct.

We agree with respondent that the claim is forfeited. Appellant never asked the court for such a hearing. Instead, he based his motion for new trial on the information already presented to the court, through Davenport's and Michel's declarations and the district attorney investigator's report.

"Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal." (*In re Sheena K.* (2007) 40 Cal.4th 875, 880.) There are exceptions to the rule, but appellant does not assert that any exception applies here, and we cannot see that one does.

We note, however, that in its ruling, the court discussed the possibility that jurors could be subpoenaed, finding that no admissible evidence could result. Thus, to the extent that appellant did raise this issue, we find no abuse of discretion.

A trial court must inquire about possible juror misconduct "'only when the defense comes forward with evidence that demonstrates "a strong possibility" of prejudicial misconduct.' [Citations.] 'Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing.' [Citation.] 'Normally, hearsay is not sufficient to trigger the court's duty to make further inquiries into a claim of juror misconduct.' [Citation.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1216-1217.) Appellant offered nothing but hearsay.

Appellant next contends that if we find forfeiture, the failure to request a hearing amounts to ineffective assistance of counsel.

On a claim of ineffective assistance, a defendant must establish both that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's professional errors, a determination more favorable to defendant would have resulted. If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails. On review, we give great deference to counsel's tactical decisions and presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions. (*People v. Holt* (1997) 15 Cal.4th 619, 703.)

Under that standard, appellant cannot prevail on his ineffective assistance claim. There is at least one obvious possible reason for counsel's failure to request an evidentiary hearing, which is that the request would have been unsuccessful, for the reasons set out above. Appellant presented no admissible evidence of misconduct.

2. The motion to strike priors

Appellant moved for an order striking two of his prior "strike" convictions for purposes of sentencing, including with the motion a declaration of counsel to the effect

that, inter alia, at the time of these offenses, appellant was married, had a child, and was working full time.

The court denied the motion, finding, "I believe that [appellant] may have been a good husband, and tried to provide for his family. [¶] That's not really the issue that's before the court with regards to sentencing. It's certainly a mitigating circumstance. But it's not necessarily controlling." The court then denied the motion, finding that "I've reviewed the documentation that's been provided to the court by both sides. I do not find that the defendant is a person that falls outside of the spirit of the Three Strikes law."

Our review is for abuse of discretion. Thus, the appellant "must demonstrate that the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance. (*People v. Wade* (1959) 53 Cal.2d 322, 338.)" (*People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.)

Here, appellant argues the evidence that his record does not include any crimes involving violence, but that his crimes were mostly theft-related, and the evidence that the "gun" used in these robberies was in fact a toy gun, which only looked like a real firearm. He also cites the fact that he could have received a long sentence even if two of the priors were stricken.

All of that is true, but it is also true that appellant had a long history of offenses, beginning in 1987, when he was a juvenile, and continuing with convictions in 1990 (attempted robbery), 1991 (disturbing the peace), 1993 (taking a vehicle without consent) and 1996 (two counts of robbery). He also had parole and probation violations. The current offenses, which involved robberies of six different Starbucks locations, took place during the short period between December 15, 2008 and January 30, 2009, and began only a year after his most recent parole.

Further, the trial court's comments indicate that it properly considered the nature and circumstances of appellant's current and prior convictions and the particulars of his background, character and prospects, and reached an impartial decision. (*People v. Williams* (1998) 17 Cal.4th 148, 161-164.) Thus, the trial court did not abuse its discretion.

Disposition

The judgment is affirmed.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.